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IN THE
Supreme Court of the United States

October Term, 1965

No. 666

J. C. MARTIN CORPORATION,
Petitioner

vs.

FEDERAL TRADE COMMISSION,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Justices of the Supreme Court of the United States:

The petitioner, J. C. Martin Corporation, respectfully prays that a writ of certiorari issue to review the final decree of the United States Court of Appeals for the Third Circuit entered at that court's No. 15,068 on June 25, 1965, affirming and enforcing an order to cease and desist entered against your petitioner by respondent Federal Trade Commission at its Docket 8520 on July 8, 1964.

A. OPINIONS BELOW

An opinion was filed by the Court of Appeals for the Third Circuit on May 26, 1965, stating its reasons why respondent's order should be affirmed and enforced. This opinion is appended hereto as Appendix "A" and is reported at 346 F. 2d 147. The order and opinion of the Federal Trade Commission entered July 8, 1964, which was reviewed by the Court of Appeals for the Third Circuit, is contained in the Joint Appendix filed in that court at pages 57a to 63a. In order to ascertain the grounds of the court's opinion and of the Commission's order, it is necessary also to refer to an opinion of the United States Court of Appeals for the Seventh Circuit entered April 3, 1957, at that court's No. 11,859, in the case of *J. C. Martin Corp. v. Federal Trade Commission,* reported at 242 F. 2d 530. That opinion is contained in the Joint Appendix at pages 258a-268a.[1]

B. GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

i. The Court of Appeals' decree sought to be reviewed is dated June 25, 1965, and was entered on that date.

[1] The entire record at Commission Docket 6145, including the record of review by the Court of Appeals for the Seventh Circuit, was incorporated by reference in the record at Docket 8520 (232a-234a) and was certified by the Commission to the Court of Appeals for the Third Circuit as part of the instant record.

ii. The Court of Appeals' order denying a rehearing is dated July 15, 1965. There has been no order extending the time within which to petition for certiorari.

iii. Jurisdiction to review the Court of Appeals' decree by writ of certiorari is conferred on the Supreme Court by Section 1254(1) of the Judicial Code, 28 U.S.C. §1254(1), and by Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §45(c).

C. QUESTIONS PRESENTED FOR REVIEW

1. Is a Federal administrative agency whose cease and desist order has been vacated and set aside on the merits by a competent Court of Appeals, bound under principles of *res judicata* to the same extent as its adversary would have become bound had the order been affirmed?

2. May the Federal Trade Commission, under color of a new docket number, reopen a proceeding involving the same parties, issues, and subject matter as one in which its cease and desist order had been vacated and set aside by a Court of Appeals, without seeking that court's leave and without averring or proving such changes in circumstances as might justify reopening in the public interest?

3. Does the Commission's order, entered under the circumstances set forth in Questions 1 and 2, deprive petitioner of due process of law?

4. Does the decree of the Court of Appeals for the Third Circuit entered June 25, 1965, at its No. 15,068, conflict with the judgment and opinion of the Court of Appeals for the Seventh Circuit entered April 3, 1957, at that court's No. 11,859?

D. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The first and second questions principally involve Section 5(c) of the Federal Trade Commission Act of 1914, 15 U.S.C. §45(c), as amended, which, insofar as is here material, provides:

> "Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside . . . Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commis-

sion as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in Section 347 of Title 28."

The third question involves the Fifth Amendment to the United States Constitution insofar as it provides:

". . . nor shall any person . . . be deprived of life, liberty or property, without due process of law . . ."

E. STATEMENT OF THE CASE[2]

The Procedural History

This case had its immediate origin in a complaint (10a-15a) issued July 13, 1962, by respondent Federal Trade Commission at its Docket 8520 against petitioner[3] and against one John Kaslow. After these parties were

[2] References consisting of numerals followed by "a" are to the Joint Appendix filed in the Court of Appeals for the Third Circuit.

[3] The complaint erroneously named petitioner as "J. C. Martin Co." Petitioner's answer to the complaint invited attention to its correct name (27a), which correction was noted by the Commission's hearing examiner in his initial decision (34a) and was adopted in the Commission's final order.

served they moved (16a) the Commission to dismiss the complaint on grounds not unlike some of those urged in this petition. The motion was opposed by Commission staff counsel (19a-25a) and was in effect denied by respondent's hearing examiner in an order entered May 2, 1963.[4] Thereafter, the parties against whom the complaint was directed filed an answer (26a-33a) denying its material averments and reserving the grounds on which they had moved for dismissal.

A hearing was held in New York City before the Commission's examiner on August 26 and 27, 1963. Evidence was taken in support of and in opposition to the averments of the complaint. Thereafter, on November 1, 1963, the examiner entered an initial decision (34a-56a) concluding that those averments had been proved, and enjoining petitioner and its co-respondent in the proceeding from

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[4] Petitioner's co-respondent in the Commission proceeding, John Kaslow, had in the meanwhile on August 31, 1962, filed an action in the United States District Court for the District of Columbia at No. 2787-62, seeking, inter alia, to enjoin the Commissioners from prosecuting their complaint at Docket 8520. This relief was denied on April 3, 1963, on entry by that court (Matthews, J.) of a summary judgment, unaccompanied by an opinion, in favor of the defendant Commissioners. Kaslow appealed to the Court of Appeals for the District of Columbia Circuit at that Court's No. 17,819, which on December 6, 1963, entered a pro forma judgment again unaccompanied by an opinion, affirming that of the District Court (Bazelon, C. J., Washington and Bastian, JJ). Kaslow then applied to the Supreme Court at its October Term, 1963, No. 888, for certiorari. His petition was denied on April 20, 1964, 377 U.S. 907. Throughout these proceedings the Commissioners' principal ground of resistance to the relief sought was that plaintiff had not exhausted either his administrative remedies before themselves, or his right to petition for review of any order adverse to him which they might enter.

selling or distributing merchandise to the public by means which the examiner found, over these parties' denials, to constitute a "game of chance, gift enterprise, or lottery scheme" (54a).

Petitioner and Kaslow appealed to the Commission pursuant to §3.22 of its rules of practice from the examiner's initial decision. On July 6, 1964, following briefs and argument, the Commission dismissed the appeal, adopted the hearing examiner's initial decision as its own, and directed the parties to effect and to report compliance (57a). An opinion by Commissioner Reilly (58a-63a) accompanied this order.

Petitioner thereupon filed a petition in the Court of Appeals for the Third Circuit seeking review of the Commission's order and averring, inter alia, that it carried on business within that circuit. Under Section 5(c) of the Federal Trade Commission Act, 15 U.S.C. §45(c), quoted above, that court had authority to review the order, and such authority is the basis in this case for Federal jurisdiction in the court of first instance.

On May 26, 1965, after briefs and oral argument, the Court of Appeals for the Third Circuit (Kalodner, Hastie, and Freedman, JJ.) filed a per curiam opinion (Appendix "A" hereto) three paragraphs in length holding (1) that there was substantial and competent evidence to support the cease and desist order, and (2) that the Commission was not barred under principles of *res adjudicata* or collateral estoppel from prosecuting its complaint, by reason of what the court termed "the former proceeding" of *J. C. Martin Corp. v. Federal Trade Commission*, 242 F. 2d 530. The court's opinion directed that the Com-

mission's order be affirmed and enforced. Thereafter, on June 25, 1965, the Court of Appeals (Kalodner, J.) entered a final decree affirming the Commission's order and commanding petitioner to comply therewith within such periods of time as are prescribed by the Federal Trade Commission Act for it to become final. Petitioner sought a rehearing. This was denied, without further opinion, on July 15, 1965. This petition for certiorari has followed.

Statement of Facts Material to Consideration of Questions Presented

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The facts material to the consideration of the questions presented in this petition, center on the identity of the Commission proceeding at its Docket 6145 to that which it later prosecuted at its Docket 8520. These facts will be set forth in the argument to follow.

F. ARGUMENT

1. The Instant Commission Proceeding Involved the Same Parties, Issues and Subject Matter as Did That Culminating on April 3, 1957, in J. C. Martin Corp. v. Federal Trade Commission, 242 F. 2d 530

Petitioner's central position in this Court hinges on whether the parties, issues, and subject matter as between the Commission proceeding here on review, and that which culminated on April 3, 1957, in the judgment and opinion[5] of the Court of Appeals for the Seventh Circuit in *J. C. Martin Corp. v. Federal Trade Commission*, 242 F. 2d 530, were different or the same. It is petitioner's position that the parties, issues, and subject matter in the two proceedings were substantially identical. In petitioner's view, this has two effects. First, the Commission was without authority to initiate its later proceeding docketed at No. 8520 in the face of an outstanding Court of Appeals

[5] During the course of hearing before the Commission, petitioner offered (232a-234a) to incorporate by reference in the instant record the entire record at Docket 6145, including the record of review by the Court of Appeals for the Seventh Circuit. The hearing examiner accepted this offer (233a). As part of the Joint Appendix filed in the Court of Appeals for the Third Circuit petitioner has caused to be printed the Commission's complaint filed at Docket 6145 (242a-250a); the answer thereto (250a); the examiner's initial decision (251a-256a); the Commission's final order (257a); and the judgment and opinion of the Court of Appeals vacating that order and setting it aside (258a-268a).

decree which it did not contest before it became conclusive;[6] and from which it has never since sought to be relieved. Second, the Commission should have dismissed its own complaint against petitioner at Docket 8520 in the light of familiar principles of *res judicata* and collateral estoppel. The effects of the earlier proceeding at Docket 6145 on the later one at Docket 8520 will be discussed in Parts 2 and 3 of this argument to follow. Petitioner proposes in this part to show that these proceedings in every real sense were the same.

First, as to parties. It is not disputed that the Commission's complaint at Docket 6145 named petitioner and John Kaslow[7] as respondents and that these persons were the sole respondents later named at Docket 8520. Although the earlier complaint additionally named one Seymour Orenstein as a third respondent, it is to be noted that the earlier complaint expressly (243a), and the later complaint to equal effect (10a, "paragraph One"), averred purely collective action on the part of all respondents as a class. Neither complaint averred any conduct on the part of one respondent not also attributed to each of the others. Thus, the identicality of the parties is not diminished by the fact that only two of the three parties joined

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[6] The Commission never sought rehearing of the April 3, 1957, decree, nor did it apply for certiorari.

[7] The earlier complaint refers to John Kaslow as Jack Kaslow (242a). Speaking through its hearing examiner, the Commission in the instant proceeding expressly found (35a) on the basis of Kaslow's testimony (208a) and other uncontested evidence, that John Kaslow is "one and the same" person as the respondent at Docket 6145 bearing that surname, and also that the corporate respondent in each proceeding was "one and the same". Petitioner has thus amply met its burden of proving these parties' identity: see Restatement of Judgments, §79, comment (e).

in the first proceeding were made parties to the second. Absent from this record is the problem which might have arisen had a new party been joined as a respondent in the second proceeding. The controlling consideration in the case at bar is that *each of the parties to the proceeding at Docket 8520 had also been a party to that at Docket 6145.*

Equally clear, though denied by the Commission in its order, is the fact that the issues raised by the complaints are identical. Analysis shows each complaint to contain various peripheral averments which serve merely to identify the parties, locate their place of business, allege interstate commerce, cite the Commission's authority to bring the proceeding, and furnish notice of hearing and of a proposed order. These averments, which for the most part are repeated by the second complaint from the first one *word for word,* are not germane to the present inquiry. There remain as the core of each complaint only the accusative or recriminatory portions, comprising Paragraphs Three, Four and Five of the complaint filed at Docket 6145 (244a-247a) and Paragraphs Four and Five of that filed at Docket 8520 (11a-13a). For the Court's convenience these paragraphs are reproduced in parallel columns as Appendix B hereto.

Neither the hearing examiner's initial decision, nor respondent's final order, nor the opinion of the Court of Appeals for the Third Circuit, see fit to analyze the issues raised by an honest comparision of the earlier with the later complaint. Instead, these adjudications contain only cursory and ill-considered conclusions that *res judicata* does not bar the later proceeding. This result appears to rest on two positions: first, the Commission differen-

tiates the complaints on the basis of the inclusion in the later one of what its examiner calls a "further and separate charge in paragraph five" (50a); second, the Commission makes reference in its final order (62a) to what it calls the different "time period covered by [the later] complaint". These purported points of difference are spurious.

The first point wholly rests on an assumption (61a) that the words "chance or gaming device" contained in the second section of Paragraph Five of its later complaint (12a) constitute an accusation in some way distinguishable from the charges of "game of chance, gift enterprise, or lottery scheme" (244a), and "means of chance, lottery, or gift enterprise" (247a), with which the prior complaint is replete.[8] However doubtful on its face this position may be,[9] it might, at least, be colorable had the later

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[8] In Civil Action 2787-62 (see footnote 4, ante) plaintiff John Kaslow served interrogatories on the then defendants to compel them to disclose precisely what new or different meanings attached to or inhered in "chance or gaming device" not already inherent in "game of chance, gift enterprise, or lottery scheme". The Commissioners did not answer these interrogatories pending a ruling on their motion for summary judgment in that action. Eventually, when their motion was granted, they were excused from any obligation to respond.

[9] "Gaming" is defined on page 888 of Webster's New International Dictionary, 1926 ed. (G. & C. Merriam Company) as the "act or practice of playing games for stakes or wagers; gambling." The same authority, page 1278, defines "lottery", to such extent as seems here material, as "a scheme for the distribution of prizes by lot or chance." Under these definitions it would appear that the terms "chance or gaming device" and "game of chance" are interchangeable, particularly where the latter term has been disjunctively coupled with the term "lottery".

complaint averred any operative facts—any conduct on the part of petitioner or its co-respondent—showing that the overt acts said to constitute the making of sales by means of a "chance or gaming device" in some way differed from the acts said to constitute sales by "means of chance, lottery, or gift enterprise" or by "game of chance, gift enterprise, or lottery scheme". Plainly, however, no such facts are set forth in the later complaint. In actuality, the Commission's final order goes far toward conceding that no such facts exist when it remarks (62a) that the real distinction is that "the theory" of the later complaint and of the hearing examiner's initial decision "are more comprehensive than the first complaint".

The Commission's second point—that the "time period" covered by the later complaint differs from that covered by the first one—is also meretricious. Neither complaint avers any specific period of time over which the assertedly unlawful conduct has taken place. The complaint at Docket 6145 averred (243a, 244a) that the conduct complained of had taken place "now and for more than one year last past;" that at Docket 8520 averred (10a, 11a) that such conduct had taken place "now, and for some time last past". Respondent's argument that because time elapsed between the filing of the complaints they must cover different periods of time, assumes without basis that each complaint was rooted in acts or conduct occurring not before one date, and not after another, each expressly averred. Plainly, these complaints were not so drawn. Each was intended to cover business practices extending from the indefinite past into the indefinite future. To complain of trade practices in this way is, indeed, the Commission's proper function and policy,

sitting as it does in authority not over the unregulated past but over the regulable future: see prior Section 1.1 of the Commission's former rules of practice, as amended to October 19, 1961, 16 C.F.R. former Section 1.1; see also: *P. Lorillard Co. v. F.T.C.*, 186 F. 2d 52, 1950 (C.A. 4). Viewed in this proper light, the complaints do not cover different time periods, but refer to the same business practices arising from the same unspecified date in the past and likely to persist to the same unspecified date in the future. Moreover, as will be shown more clearly in the parts of this petition to follow, to accede to the Commission's position on this score is to allow it at whim, without showing of changed facts or circumstances rooted in the public interest, to reopen proceedings long since closed and finally adjudicated, on the bald ground that a freshly filed complaint automatically and without more imports into the proceeding a new and different "time period". While Congress intended to vest broad authority and discretion in the Commission, its own rules of practice, §3.28(b), 16 C.F.R. §3.28(b), of which more hereafter, argue strongly that such a result was not intended.

In the light, thus, of the substantially complete identity as to parties and issues of the complaint at Docket 8520 to that at Docket 6145, it becomes important also to consider what the later complaint did *not* aver. It entirely failed to aver any change in facts or circumstances in petitioner's method of doing business, or in the field of the public interest, or in the climate of public morals, or in any statute, or in any field of judicial decision, or in any other area, which might justify what should be apparent to this Court as the reinstitution of the earlier proceeding. Moreover, the later complaint failed to aver

leave either sought from or granted by the Court of Appeals for the Seventh Circuit to reinstitute the earlier proceeding; that proceeding went unmentioned. These omissions had the effect of giving to respondent's offspring the innocent face of the newly born. It is time for this Court to strip this hoary infant of its swaddling clothes.

We turn now to whether, apart from parties joined and apart from issues pleaded,[10] the subject matter of the two proceedings was also the same.

If the question for this Court's decision were the correctness of a lower court's judgment disposing of an action in personam which had sought either the payment of money or other legal relief, this branch of petitioner's argument might well stop here. For in having shown (1) that the second action was maintained on the same cause of action as the first, and (2) that the parties to both actions were the same, petitioner would have done all that is required to bring into play Sections 45 and 46 of the *Restatement of Judgments,* which provide (so far as is here material) that where a valid and final personal judgment is rendered in favor of a defendant it shall be conclusive as between the parties and shall extinguish the cause of action. A further result of this situation is set forth in Section 63:

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[10] Petitioner's answer to the complaint at Docket 8520 (26a-33a) raised as a defense the disposition of the Docket 6145 proceeding; however, with respect to the merits of the later complaint, it denied the accusation of unfair acts and practices in commerce, as well as any other violations of the Federal Trade Commission Act, and was thus in legal effect on all fours with the answer (250a) to the earlier complaint, in which petitioner made identical denials.

> "Where a judgment on the merits is rendered in favor of the defendant, the plaintiff is precluded from subsequently maintaining an action on the same cause of action *although he presents a ground for the relief asked other than those presented in the original action. . . .*". (Emphasis supplied.)

However, the instant case lies in the field of administrative law and not of legal judgments. There is authority that in this field the doctrine of *res judicata*, and its related concepts, are persuasive but not binding. Accordingly, it should be noted that in addition to identity of parties and of issues, there was identity of subject matter as between the two proceedings, in the sense that the Commission at Docket 8520 adduced virtually the same proofs in support of its complaint as it had at Docket 6145.[11] Therefore, even if the "cause of action" at Docket 8520 is deemed not to be the same as that set forth in the complaint at Docket 6145, the "questions of fact essential to the judgment [and] actually litigated and

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[11] John Kaslow, called as the Commission's principal witness in both cases, testified in the later proceeding (119a-120a) that there was no difference in the way he and the petitioner have conducted their business at any time either before or after the termination of the earlier proceeding. In each of them it was he who testified as to how the business was operated and sales consummated. Kaslow's testimony taken April 6, 1954 (Docket 6145 transcript, pp. 12-40, 55-56) shows a method of operation of the business absolutely identical to that to which he later testified on August 26, 1953 (75a-105a). In the earlier proceeding the Commission called two, in the later one three persons who had sold petitioner's merchandise through its catalogues; while these were different persons and represented different sales, what each had to say was substantially the same (Docket 6145 transcript, pp. 57-69, testimony of Helen Capinas and Mary Jorn; 123a-198a).

determined" in the earlier proceeding were the same as those later sought to be relitigated in Docket 8520. There is thus invoked the principle of collateral estoppel, expressed as follows, to the extent here material, in Section 68 of the *Restatement of Judgments:*

> "(1) Where a question of fact essential to the judgment is actually litigated and determined by a valid and final judgment, the determination is conclusive between the parties in a subsequent action on a different cause of action . . .".

The effect of the doctrine of collateral estoppel and that of *res judicata* on administrative proceedings such as here involved, will be discussed in Part 3 of this argument. For present purposes it suffices in recapitulation to note that the parties, issues, and subject matter of the Docket 6145 and the Docket 8520 proceedings, were the same.

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2. Respondent Commission Was Without Authority To Reinstitute Its Prior Vacated Proceeding Against Petitioner Under Guise of a New Docket Number, Without Leave of the Court of Appeals for the Seventh Circuit

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What authority did respondent Commission have to reinstitute, as petitioner has shown it did, its prior vacated proceeding under guise of a new docket number, without leave sought from or granted by the Court of Appeals for the Seventh Circuit? Petitioner submits it had none.

Section 5(d) of the Federal Trade Commission Act, 15 U.S.C. §45(d), provides that "the jurisdiction of the court

of appeals . . . to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive." The procedure to invoke such jurisdiction, and the effects of invocation, are set forth in the preceding subsection, Section 5(c), 15 U.S.C. §45(c), which, so far as is here material, provides:

> "Any person . . . required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals . . . within any circuit where the method of competition or the act or practice in question was used or where such person . . . resides or carries on business, by filing . . . a written petition praying that the order of the Commission be set aside. . . . Upon such filing . . . the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter . . . *a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed,* and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. . . . *To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission.* . . . The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari . . ." (Emphasis supplied.)

It is well settled that the Court of Appeals' decree affirming, modifying, or enforcing the Commission's order

is the court's own, violation of which by a party who has been a respondent before the Commission is punishable in contempt proceedings in that Court of Appeals[12] (*Curtis Publishing Company v. F. T. C.*, 270 F. 881, 1920 (C.C.A. 3); *Dolcin Corp. v. F. T. C.*, 219 F. 2d 742, 1955 (C.A., D.C.). The effect of entry of its decree by the Court of Appeals is to merge within it the Commission's order: *United States v. Morton Salt Company*, 338 U.S. 632, 70 S. Ct. 357, 1950. On entry of its decision by the Court of Appeals, it is its duty to issue process in the nature of a mandate[13] commanding obedience thereto by the party or parties affected.

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[12] Prior to enactment of the Wheeler-Lea amendments, so-called, to the F.T.C. Act on March 21, 1938, 52 Stat. 111, application to the Court of Appeals constituted the sole method under which the Commission could secure enforcement of a cease and desist order. That amendment, however, added subsection (l) to Section 5 of the Act, 15 U.S.C. §45(l), empowering the Commission to institute civil actions in the District Courts in the name of the United States for pecuniary penalties to punish violations. That the amendments were not intended to interfere with the Courts of Appeals' equitable powers to enforce their decrees is apparent from the fact that they did not change subsection (d) of Section 5, already quoted, giving them exclusive jurisdiction "to affirm, enforce, modify, or set aside" Commission orders.

[13] Whether a formal mandate is to be issued by the Court of Appeals or whether its decree, though speaking as such, is not to be so labeled, depends on whether the court is deemed to be exercising its appellate or its original jurisdiction, and appears not yet settled: see subsections (g) and (k) of Section 5 of the F.T.C. Act, 15 U.S.C. §§45(g), 45(k); *L. B. Silver Co. v. F.T.C.*, 85 F. 752, 753, 1923 (C.C.A. 6); Beer, Federal Trade Law and Practice, §156, pp. 454-455. In the instant case the Court of Appeals for the Seventh Circuit did not issue a formal mandate in connection with its decree of April 3, 1957, at its No. 11,859. However, petitioner is advised by the clerk of that court that the decree was served on the Commission on April 20, 1957.

Argument

Sauce for the goose is sauce for the gander. If the Commission's order at Docket 6145 had been affirmed by the Court of Appeals for the Seventh Circuit, petitioner would have become bound to obey that Court's decree and would have been given short shrift had he not complied. To an equal extent, petitioner submits, the Commission became bound to the terms of that order, and was without power to reopen its vacated proceeding without that court's leave.

The proper procedure for the Commission to have followed in the instant situation is indicated in such cases as *F.T.C. v. Standard Educational Society,* 148 F. 2d 931 (C.A. 2), and *American Chain & Cable Co. v. F.T.C.,* 142 F. 2d 909, 1944 (C.C.A. 4), where on application in one case by the Commission and in the other by the private party to the Commission proceeding, facts and circumstances said to have changed since entry of the original Court of Appeals decree were cited, and that court asked to modify or amend its decree. In this way there could have been an orderly proceeding, affording both sides full opportunity to be heard, enabling the court most familiar with the record already made to decide the validity of the Commission's contentions. Each of the cases cited is authority for the proposition that the jurisdiction of the Court of Appeals, once attached either by way of a petition by the Commission for enforcement, or by way of a petition on the part of private parties for review, is not only exclusive but is continuing (*N.L.R.B. v. Hopwood Co.,* 104 F. 2d 302, 1939 (C.C.A. 2)). Once the court's decree issues and is served, the Commission is bound to conduct further proceedings, if any, within and not without the framework

of that decree, and may not violate its terms: *Carter Products, Inc. v. F.T.C.*, 268 F. 2d 461, 1959 (C.A. 9).

There exists still another unmistakable signal showing lack of Commission authority to have reinstituted its Docket 6145 proceeding. It is well settled that how an administrative agency has construed the statutes it administers, as shown in its decisions and in the rules of procedure which it has promulgated, is a proper guide to determining the intent of Congress, particularly where such action on the agency's part has gone unchallenged over a long period of time and has remained unchanged by specific legislation. So here. Section 3.28(b) (1) of the Commission's own rules of practice, 16 C.F.R. §3.28(b) (1),[14] provides for notice to an affected party, and an opportunity for him to answer, where the Commission, having dismissed its own complaint, later decides that the proceeding should be reopened in view of the public interest, or in view of "changed conditions of fact or law."

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[14] [Reopening after Commission decision has become final]. "Whenever the Commission is of the opinion that changed conditions of fact or law or the public interest may require that a Commission decision containing an order to cease and desist which has become final by reason of court affirmance or expiration of the statutory period for court review without a petition for review having been filed, *or a Commission decision containing an order dismissing a complaint,* should be altered, modified or set aside in whole or in part, the Commission will serve upon each person subject to such decision and order an order to show cause, stating the changes it proposes to make in the decision and the reasons they are deemed necessary. Within thirty (30) days after service of such order to show cause, any person served may file an answer thereto. Any person not responding to the order within the time allowed may be deemed to have consented to the proposed changes." (Emphasis supplied.)

A later part of the same section of the Commission's rules[15] provides opportunity for a hearing where reopening is opposed and the issues appear substantial. Should not these principles be deemed to be even more integral a part of the Federal Trade Commission Act under circumstances where the Commission proceeding has been vacated and set aside not by voluntary action of the Commission, but by judicial compulsion?

The conclusion is inescapable that respondent Commission had no authority to reopen its Docket 6145 proceeding without leave granted by that Court of Appeals which had set its order aside. From all that appears in this record, the assignment of a new docket number to respondent's improperly reopened proceeding was yet another contrivance intended to evade respondent's plain duty to apply for leave to reopen to the appellate court having continuing jurisdiction.

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[15] The Rules of Practice, §3.28(b) (3), further provide:

"Whenever an order to show cause or petition to reopen is not opposed, or if opposed but the pleadings do not raise issues of fact to be resolved, the Commission, in its discretion, may decide the matter on the order to show cause or petition and answer thereto, or it may serve upon the parties a notice of hearing, setting forth the date when the cause will be heard. In such a case, the hearing will be limited to the filing of briefs and may include oral argument when deemed necessary by the Commission. *When the pleadings raise substantial factual issues, the Commission will direct such hearings as it deems appropriate, including hearings for the receipt of evidence by it or by a hearing examiner. . . .*" (Emphasis supplied.)

3. The Commission Should Have Dismissed Its Own Complaint at Docket 8520 on the Basis of Res Judicata or of Collateral Estoppel

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For the Commission not to have dismissed its own complaint against petitioner at Docket 8520, on petitioner's motion (16a-18a) inviting attention to the circumstances of its issuance, was, clearly, a gross abuse of its discretion and a violation of law.

Part 1 of this argument, demonstrating that the parties, issues, and subject matter of the Docket 6145 and the Docket 8520 proceedings were the same, has already pointed to the obvious conclusion to be drawn—that on the analogy of the law of *res judicata* the Commission should have dismissed its later complaint. This law, insofar as is here material, is clearly set forth in Sections 45 and 46 of the *Restatement of Judgments:*

> "§45. *Judgment in Action for the Recovery of Money.*
>
> "Where a valid and final personal judgment is rendered in an action to recover money, the judgment is conclusive between the parties, except on direct attack, to the following extent:
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> • • • • • • •
>
> (b) if the judgment is in favor of the defendant and is on the merits, the cause of action is extinguished;
>
> (c) whether the judgment is in favor of the plaintiff or of the defendant, it is conclusive in a

subsequent action between them upon the issues actually litigated in the action."

"§46. *Judgment in Action Not for the Recovery of Money.*

"The rules stated in §45 are applicable to judgments in actions other than for the recovery of money, except that where the judgment is given for the plaintiff there is no merger of the cause of action in the judgment."

And Section 48 of this *Restatement* additionally states:

"Where a valid and final personal judgment is rendered on the merits in favor of the defendant, the plaintiff cannot thereafter maintain an action on the original cause of action."

The "cause of action" asserted by the Commission in its complaint at Docket 6145 was that the there respondents were selling and distributing merchandise "by means of a game of chance, gift enterprise, or lottery scheme" (246a), thus furnishing to others "the means of conducting lotteries" (246a) in connection with such sale. According to that complaint, this sales method was a "practice of a sort which is contrary to an established public policy of the government of the United States".

The proceeding was heard on the whole record by the Court of Appeals, which on April 3, 1957, entered a judgment accompanied by an opinion stating that the court felt "constrained to reject the finding of the Commission that petitioners' sales constitute a lottery scheme" (267a), 242 F. 2d 530, 532. Obviously, this was a judgment on the merits. The question remaining is whether respondent

Commission occupies such special status under the law as to empower it to disregard the principles of the Restatement and assert its cause of action in its own forum for the second time. It seems to this petitioner that the possibility of the abuse by the Commission of its enormous powers should impel this Court to grant certiorari on this ground alone.

In the leading authority's words:

> ". . . the idea expressed in some judicial opinions that res judicata has no application to administrative decisions is unsound both on principle [and] according to most authorities. Some administrative decisions are res judicata. The next problem is to determine what administrative decisions should or should not be given res judicata effect."
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> (2 *Davis, Administrative Law,* §18.03, pp. 557-558.)

"As a matter of principle", remarks this authority,

> "it is completely clear that the reasons behind the doctrine of res judicata as developed in the court system are fully applicable to *some* administrative proceedings. The reasons against a second litigation between the same parties of the same claims or issues are precisely the same for some administrative determinations as they are for most judicial determinations. The sound view is therefore to use the doctrine of res judicata when the reasons for it are present in full force, to modify it when modification is needed, and to reject it when the reasons against it outweigh those in its favor."

(2 *Davis*, op. cit., §18.02, p. 548.)

In the instant situation respondent has a clear and unused remedy to which it at all times could have had recourse: it could have petitioned the Court of Appeals for the Seventh Circuit for leave to reopen the Docket 6145 proceeding. This circumstance alone mitigates strongly against relaxation of the rule of *res judicata* and the rekindling of quenched fires which is its inevitable result.

The hearing examiner in the instant proceeding rejected the defense of res judicata on the basis of those authorities (not particularized or discussed by him[16]) which Commission staff counsel had cited in his answer (19a-25a) to the motion to dismiss the complaint at Docket 8520. Chief among these authorities was *F.T.C. v. Raladam Co.*, 316 U.S. 149, 62 S. Ct. 966, 1942. That case involved a background in which, in 1929, the Commission had found that a pharmaceutical manufacturer had used unfair methods of competition in selling "Marmola" as a fat-reducing substance. The Circuit Court of Appeals set aside a cease and desist order, and the Supreme Court at 283 U.S. 643, 51 S. Ct. 587, 1931, affirmed, on the ground that there had been no evidence that competitors had been injured. A motion by the Commission to offer additional evidence to show such injury, was denied. The Commission proceeding leading to the later case began in 1935, when the Commission issued a new proceeding on the same grounds, this time making the requisite finding of injury to competitors. On review, this

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[16] The whole of the hearing examiner's disposition of the question of *res judicata* is contained in a two sentence footnote appended to his initial decision: 36a, Footnote 5.

Court declined to apply *res judicata*, saying merely that "the reasons for refusing to enforce the Commission's order are grounded upon the inadequacy of the findings and proof, as revealed in the particular record then before this Court. Hence, these reasons are not controlling in this case, arising, as it does, out of different proceedings and presenting different facts and a different record for our consideration."

Raladam is to be distinguished from the case at bar if only because in the present situation the Commission did not have a different record or different facts before it. The long and short of what the Commission did here, was to pay lip service to a new theory but to convict on the same operational facts and the same record. Without colorable ground to bring the proceeding, this is harassment. And while "new violations will support new proceedings dealing with different periods of time" (*Exposition Press, Inc. v. F.T.C.*, 295 F. 2d 869, 1961 (C.A. 2)), it is essential that there be "no indication of harassment by the Commission".

The instant situation in sum reflects a pertinacious resolve on the part of a Federal administrative agency invested with enormous power, to convict petitioner of wrongdoing without regard to the law of its case already established, and without regard to the dearth of new facts. So viewed, the situation is not unlike that in *Deering-Milliken, Inc. v. Johnston*, 295 F. 2d 856, 1961, where the Court of Appeals for the Fourth Circuit affirmed the District Court's order enjoining the N.L.R.B.'s regional director from instituting a "new" hearing requiring the plaintiff to defend an assertedly unfair labor practice, where it was perfectly obvious that no new facts would

be developed, and that the agency had already developed all available evidence but had been unable to prove any violation of the Act. The refusal of relief of this kind to your petitioner's co-respondent at Docket 8520 in the action in the District Court for the District of Columbia makes relief on the merits in this Court even more necessary and appropriate.

G. CONCLUSION

That the Commission's actions in this case have been unlawful and a gross abuse of the authority entrusted to it by Congress, has been, petitioner submits, clearly shown. Petitioner is aware, nevertheless, that the grant of certiorari lies within this Court's discretion, sparingly exercised. Petitioner submits that this case raises important issues centering not only on the lawfulness of respondent's conduct, but on broader questions having to do with the essential limits of governmental powers exercised through quasi-judicial agencies. In addition, the instant situation raises an implicit conflict between the decisions of the Third and of the Seventh Circuits, which is not the less important because your petitioner may alone be affected thereby. Under all the circumstances, it is submitted that certiorari should be granted.

Respectfully submitted,

MILES WARNER,

WALTER D. HANSEN,

Attorneys for Petitioner.

APPENDIX "A"

Argued May 3, 1965

OPINION OF THE COURT

(Filed May 26, 1965)

Before Kalodner, Hastie and Freedman, *Circuit Judges*
Per Curiam

This is a petition to review and set aside an Order of the Federal Trade Commission at the close of an administrative proceeding upon a complaint charging petitioner with having engaged in unfair acts and practices in violation of Section 5 of the Federal Trade Commission Act, 66 Stat. 632 (1952), 15 U.S.C.A. 45(a). The Order directed the petitioner and others to cease and desist from merchandising by means of a game of chance, gift enterprise or lottery scheme.

On review of the record we are of the opinion that it presents substantial and competent evidence to support the Commission's findings and Order. We are further of the opinion that the former proceeding of the Commission against the petitioner and others, J. C. Martin Corp. v. Federal Trade Commission, 242 F. 2d 530 (7 Cir. 1957), did not bar its prosecution of the instant proceeding by reason of *res adjudicata* or collateral estoppel.

For the reasons stated the Order of the Commission will be affirmed and enforced.

APPENDIX "B"

COMPLAINT AT DOCKET 6145

PARAGRAPH THREE: In the course and conduct of their business as described in paragraph one hereof respondents sell and distribute said articles of merchandise by means of a game of chance, gift enterprise, or lottery scheme. Respondents cause to be distributed to members of the public, representatives and salesmen, and prospective representatives and salesmen certain advertising literature including a sales circular. Respondents' merchandise is distributed to the purchasers thereof in the following manner:

A portion of said sales circular consists of a list on which there are designated a number of items of merchandise and the prices thereof. Adjacent to the list is printed and set out a device commonly called a pull card. Said pull card consists of a number of tabs, under each of which is concealed the name of an article of merchandise and the price thereof. The name of the article of merchandise and the price thereof are so concealed that purchasers, or prospective purchasers, of the tabs or chances are unable to ascer-

COMPLAINT AT DOCKET 8520

PARAGRAPH FOUR: In the course and conduct of their business as aforesaid, the respondents sell and distribute said articles of merchandise, through others, by means of a lottery scheme. Their operational plan is as follows:

Respondents cause to be distributed through the mails, a brochure or catalog depicting, among other things, pictures, or description of prizes or premiums offered to persons who sell their merchandise.

A portion of said sales catalogs consists of a list on which there are designated a number of items of merchandise offered for sale and the prices thereof. Adjacent to the list is printed and set out a device commonly called a pull card. Said pull card consists of a number of tabs, under each of which is concealed the name of an article of merchandise and the price thereof. The name of the article of merchandise and the price thereof are so concealed the purchasers, or prospective purchasers, of the tabs or

tain which article of merchandise they are to receive or the price which they are to pay until after the tab is separated from the card. When a purchaser has detached the tab and learned what articles of merchandise he is to receive and the price thereof, his name is written on the list opposite the named article of merchandise. Some of said articles of merchandise have purported and represented retail value greater than the prices designated for them, but are distributed to the consumer for the price designated on the tab which he pulls. The prices of others of the articles are higher in proportion than the articles first mentioned. The apparent greater values of some of said articles, induces members of the purchasing public to purchase the tabs or chances in the hope that they will receive articles of merchandise of greater value than the designated prices to be paid for same. The fact as to whether a purchaser of one of said pull card tabs receives an article of greater value than the price designated for same on such tab, or which of said articles of merchandise a purchaser is to receive, and the amount of money which a purchaser is required to pay, are determined wholly by lot or chance.

When the person or representative operating the pull card

chances are unable to ascertain which article of merchandise they are to receive or the price which they are to pay until after the tab is separated from the card. When a purchaser has detached the tab and learned which article of merchandise he is to receive and the price thereof and paid for same, his name is written on the list opposite the named article of merchandise.

When the person or representative operating the pull card has

has succeeded in selling all of the tabs or chances, collected the amounts called for, and remitted the same sums to the respondents, the said respondents thereupon ship to said person, salesman or representative the merchandise designated on said card, together with a premium as compensation for operating the pull card and selling the said merchandise. The said operator of the card delivers the merchandise to the purchasers of tabs from said pull cards in accordance with the list filled out when the tabs were detached from the pull card.

Respondents sell and distribute various assortments of said merchandise and furnish various pull cards for use in the sale and distribution of such merchandise by means of a game of chance, gift enterprise or lottery scheme. Such plans or methods vary in detail, but the above described plan or method is illustrative of the principle involved.

PARAGRAPH FOUR: The persons to whom respondents furnish the said pull cards use the same in purchasing, selling and distributing respondents' merchandise in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their merchandise in ac-

succeeded in selling all of the tabs or chances, collected the amounts called for, and remitted the amount collected to the respondents, the said respondents thereupon ship to said operator, salesman or representative, the merchandise designated on said card, together with a premium as compensation for operating the pull card and selling the said merchandise listed thereon. The said operator of the card delivers the merchandise to the purchasers of tabs from said pull cards in accordance with the list filled out when the tabs were detached from the pull card.

PARAGRAPH FIVE: The persons to whom respondents furnish the said pull cards use the same in purchasing, selling and distributing respondents' merchandise in accordance with the aforesaid sales plan. Respondents thus supply to and place in the hands of others the means of conducting lotteries in the sale of their merchandise in ac-

cordance with the sales plan hereinabove set forth. The use by respondents of said method in the sale of their merchandise and the sale of such merchandise by and through the use thereof and by the aid of said method is a practice of a sort which is contrary to an established public policy of the government of the United States.

PARAGRAPH FIVE: The sale of merchandise to the purchasing public in the manner above alleged involves a game of chance of the sale of a chance to procure one of the said articles of merchandise at a price less than the normal retail price thereof or to procure one of the said articles of merchandise at a price much less in proportion than the prices charged for the other articles of merchandise sold by respondents. Many persons are attracted by said sales plan or methods used by respondents and the element of chance involved therein and thereby are induced to buy and sell respondents' merchandise.

The use by respondents of a sales plan or method involving the distribution of merchandise by means of chance, lottery, or gift enterprise is contrary to the public interest and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.

cordance with the sales plan hereinabove set forth.

The sale of merchandise by the sales plan set forth and described in Paragraph Four hereof also constitutes the sale of merchandise by means of a chance or gaming device inasmuch as the identity of the article involved and the amount of money to be expended are unknown to the purchaser or participant until the tab is removed from the sales catalog or card.

The use by respondent of the aforesaid sales plan in connection with the sale of their merchandise is a practice which is contrary to established public policy of the Government of the United States and constitutes an unfair act and practice in commerce within the intent and meaning of the Federal Trade Commission Act.